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In the

Supreme Court of the United States

STATE OF WASHINGTON, et al., Plaintiffs,	)	
vs.	)	No. 45 Original
GENERAL MOTORS CORPORATION, et al., Defendants.	)	

Washington, D. C.
February 28, 1972
and
February 29, 1972

Pages 1 thru 41

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF WASHINGTON, et al., :

Plaintiffs, :

v. : No. 45 Original

GENERAL MOTORS CORPORATION, et al., :

Defendants. :

- x

Washington, D. C.
Monday, February 28, 1972

The above entitled matter came on for argument at 2:49 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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For the Plaintiffs

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For the Defendants

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: I think we'll ask counsel in No. 45 Original, State of Washington and General Motors, at least to represent themselves and see whether you would like to commence your argument now or whether you would prefer to begin in the morning. You may address yourself to that very briefly, if you wish.

MR. TAUSEND: Mr. Chief Justice, my name is Frederic Tausend. I am Special Assistant Attorney General for the State of Washington. I could introduce the argument now, if that is satisfactory to Mr. Cutler. It would divide my argument in half, but I'd be willing to do it.

MR. CHIEF JUSTICE BURGER: It's primarily your problem, so we'll let you go ahead.

We'll wait for Mr. Cutler to get assembled here.

Mr. Tausend, you may proceed.

ORAL ARGUMENT OF FREDERIC C. TAUSEND, ESQ.,

ON BEHALF OF THE PLAINTIFFS

MR. TAUSEND: Mr. Chief Justice and may it please the Court:

This is an antitrust action brought by eighteen states against the four major American automobile manufacturers and their trade association, charging the defendants with violating Section 1 of the Sherman Act.

We are here on the motion of the plaintiff states to file this action as an original action. And we are joined in this request by 18 additional states and the City of New York as amici curiae who have indicated to this Court that they would intervene in this action, for a total of 36 states and the City of New York, if this Court exercises its original jurisdiction.

The complaint which we propose to file charges the defendants with a Section 1 Sherman Act conspiracy lasting over 15 years, from 1953 until at least 1968, the purpose and effect of which was to delay, prevent, and retard the development, manufacture, and finally the installation of pollution control equipment for their automobiles.

I would like, if I could, to flesh out the allegations of this complaint with reference to some of the documents which have been obtained and reviewed by us in connection with a related multi-district proceeding in Los Angeles to which I will refer shortly, mainly for the purpose of assuring this Court that this is not a case where we have serious allegations of illegal activity but no evidence to support them. But a protective order entered in M.D.L. 31 prevents me from giving such examples. Suffice it to say that the charges on which our complaint is based are identical to a civil action filed by the Justice

Department in January, 1969, settled in October, 1969 by consent decree.

The injunctive relief obtained by the government in that decree is entirely preventive. It seeks to prevent the alleged conspiracy from continuing, and so it ended the alleged conspiracy, and to quote former Attorney General Mitchell as we do at page 18 of our opening brief, it encouraged immediate action by the automobile companies to solve the problem. However, it did not attempt to repair the damage which continues to this day and in the future to be inflicted by the cars manufactured as a result of the alleged conspiracy. And this is where the 36 states and the other governmental bodies have taken up the cudgels with this action.

Q Is it the retrofit problem or whatever you call it?

MR. TAUSEND: Retrofit, yes.

Q I'd say on the merits that's the remaining problem.

MR. TAUSEND: The basic relief that we're seeking--we ask for some other equitable relief--but the basic, principal thing we're seeking is a mandatory or reparative injunction which would require the installation on all cars manufactured as a result of the conspiracy--and for convenience we talk about pre-1968 cars, that might be the

first cut-off date--with effective pollution control equipment, and that is called retrofit. Yes, Your Honor, it is.

Q What would be--and perhaps you are going to come to this or someone will come to it--what could possibly be the aggregate liability of all the users of these automobiles?

MR. TAUSEND: The aggregate liability of the users--you mean the people who drive the automobiles?

Q Yes. Aren't we all polluting the air in some way?

MR. TAUSEMD: I suppose we are polluting the air, Your Honor. I don't think the users have violated or are charged with violating the antitrust laws. We're not here on a nuisance count. As the Court I trust is aware, in our latest brief we have stricken count three and we've done it because we want to get the speediest possible remedy. The retrofit remedy is only a viable remedy if it can be applied quickly. And count three which we put in because we needed it as a back-up count--we didn't know what kind of an antitrust case we had, we hadn't seen any documents when we filed this--now appears to us to be ballast and we have thrown it overboard to speed up the case and get to the end of our voyage; because, Mr. Chief Justice, if the retrofit remedy--and I can't give you an actual calendar date, but I

can predict reasonably closely. We've asked in the multi-district proceedings--and I will probably have to come to those tomorrow--for a December, 1972 target trial date. And Judge Real in those proceedings which are consolidated on 1407 before you--they are not all before him filed in his court--Judge Real has indicated that as a practical matter he has geared the discovery to a December, 1972 target trial date on equitable claims, equitable relief only. And if we can get that or reasonably near that, then the retrofit remedy retains its viability. But as the defendants have pointed out in their briefs at every occasion, and as we point out in our choice of law brief in the conclusion, these pre-1968 cars, of which there are now 50 million, approximately, in the United States, are leaving the road at the rate of seven or eight million cars a year, and that rate may be accelerated.

They're leaving the pollution in the air, but they are leaving the road and in, say, two years or three years there will be fewer and fewer of these cars; the air will have been polluted, and the reach to which the equitable remedy could attach, the possibility if these defendants, as alleged, did violate the antitrust laws, the possibility of making them supply the equitable remedy which best fits the wrong alleged is reduced and even eliminated. And that is why because in this case we

see--it's one of those rare cases where the best remedy is the simplest remedy. It's direct. It cleans the air. It doesn't compensate in money. The defendants themselves, as point out at page 21 of our choice of law brief, have indicated, number one, that effective devices do exist. Both Chrysler and Delco have such devices and have talked about them. And as we also point out at page 21 of that choice of law brief, Mr. Delorian, a vice president of General Motors writing in Look Magazine in May of 1970 said--

Q What is the color of that brief? I don't seem to have it.

MR. TAUSEND: Our choice of law brief, Your Honor, is grey, Plaintiffs' Memorandum, and the quote I have is on page 21, right at the bottom. "John Delorian, Vice President of General Motors in charge of Chevrolet Division, Look Magazine, page 57, August 25, 1970, said: 'If every car produced before 1969 had available retrofit devices, our air would be as pure as it was 30 years ago.'"

Now, allowing for some exaggeration, maybe 30 percent, if it could be as pure as it was 20 years ago and if they did violate the antitrust laws, as alleged, and if we can prove that, then it seems to me the remedy most clearly directed to the wrong is available if it can be obtained quickly enough.

I think before I talk about further the remedy

and the reason why we need original jurisdiction, I would meet briefly the Court's request to talk about the applicable substantive law, and that's really easy because the question is largely moot.

As I pointed out, count three has been stricken, and I gave you the reason. Count two is a common-law antitrust count. And, number one, that was included I think as a very remote hedge against the possibility the Court of Equity would, as the defendants argue it should, adopt an interpretation of the Section 16 of the Clayton Act that--Section 16, Clayton Act, Equity Court doesn't have the full powers that a common-law equity or federal equity court has.

In any event, we are in total agreement with Mr. Cutler on this. His brief states that it is a pendent count based on state common law, and we agree that we don't think the count is going to be reduced, and I really think that that for this case resolves the question of choice of law.

Now I would like to come to the reasons why we are urging this Court to accept original jurisdiction of this case. We recognize, although defendants suggest we don't, the burden that an original action case puts on the Court. We believe that this case fully satisfies the standards laid down by this Court in Wyandott and in

Georgia v. The Pennsylvania Railroad Company. There simply is no forum to which this cause could be remitted as was the case with the state court of Ohio in Wyandott. This is a federal antitrust case. And we also believe there is no single federal court--and I want to emphasize single federal court--because we believe in the interest of the burden on the judiciary system, in the interests of at least the plaintiff states, because the defendants want a different result, that this case should be tried in a single court. The equitable claims of the public body plaintiffs we believe can and should be tried in a single federal court.

The obvious question occurs, Why not the central district of Los Angeles where Judge Real is presiding as a district judge? And I think that the answer is that the defendants won't let us and that they are in a position to keep us from that single trial there long enough to make the equitable remedy no longer viable. So, we have a consideration of time, a speedy remedy in order to make the equitable relief viable, and a consideration of place, a single court.

You see, in the multi-district proceedings in Los Angeles only nine states actually filed in Los Angeles, two actions, the State of California, the State of Washington, and seven states which filed in a consolidated

action with us.

MR. CHIEF JUSTICE BURGER: I think we'll resume there in the morning, counsel.

MR. TAUSEND: Thank you, Mr. Chief Justice.

[Whereupon, at 3:00 o'clock p.m. the Honorable Court was adjourned until ten o'clock the next morning.]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume consideration of Original No. 45, State of Washington against General Motors.

Mr. Tausend, you may continue.

MR. TAUSEND: Mr. Chief Justice, may it please the Court:

Yesterday afternoon I told you what this case was about. This morning I hope to persuade you to exercise your discretion to accept this case as an original act.

The States who are plaintiffs and the amici seek two things: One, a single unified trial for the antitrust claims for equitable relief only; and, two, a speedy resolution of this litigation. So that what now appears to be the most adequate equitable remedy; namely, retrofit of pre-1968 cars at the expense of the defendants can remain a visble possibility for the Court to administer, if it sees fit to do so, at the conclusion of the case.

Under the standards which this Court laid down in Wyandotte and Georgia, you must, in exercising your discretion, ascertain first if there is an alternative form to which this case may be remitted in the interest of convenience, efficiency, and justice.

Now, clearly, because this is a Sherman Act, Section 1, case, that forum must be a Federal one. The apparent alternative form that comes to mind is the District Court in the Central

District of California at Los Angeles, the multidistrict court. Judge Real has served almost two years as the 1407 Transferee Judge. He's familiar with many of the facts in this litigation in that capacity; he's presided over extensive pretrial hearings. I believe there've been at least six; he has attended portions of the two depositions of officers of the defendants that have been taken to date; he's read some of the documents which were submitted to him in brief under seal. And he has made it clear, by adopting plaintiffs' proposed discovery and trial preparation schedule, that under his direction these cases could be ready to go to trial in December 1972.

But standing adamantly in the way of that resolution of a single trial in December 1972 on the equitable issues are these defendants.

As I pointed out yesterday, 34 of the governmental cases were brought in districts other than the Central District of California; 23 separate districts, as a matter of fact. So to achieve a single trial at the District Court level, there would have to be transfers to Los Angeles of all 34 cases under 28 U.S.C. Section 1404.

And the defendants have announced time and again that they would resist such transfers and such a consolidated trial.

At page 4 of their supplemental brief, which is the cream-colored brief, the next to the last brief they have filed

in this action, they assert that a joint trial was not feasible, not feasible. And that the proceeding before Judge Real in Los Angeles a week ago Thursday, the defendants indicated just how vigorously they will resist such a transfer on both substantive and procedural grounds, if Judge Real attempts to go ahead with it.

I have submitted the transcrpt of those proceedings as an appendix to our brief, and I am going to quote from Mr. Cutler at page 51 of the transcript, I am going to quote a few remarks. And if the Court has the transcript and would like to see the entire context of those remarks that Mr. Cutler made, I invite your attention to page 51.

Mr. Cutler told the Court, and I quote: "I think we would have to say that any decision at this point in favor of transfer and consolidation is something which we would feel bound to seek review."

And then said Mr. Cutler, "Everything would be held up while that was being resolved."

Now, Mr. Cutler's thrust has two points: One, very clearly, the defendants intend if they can to hold up everything attacking these transfers; and the second point is that they will seek review, which means that ultimately this case is going to reach this Court, and probably more than once. Because the defendants have already taken an interlocutory appeal from Judge Real's order denying their motion to dismiss.

The interlocutory appeal, Your Honors, was certified in November 1970, the case was finally argued in the Ninth Circuit on that in January 1972. It is now sub judice, and certiorari, I believe, is certain.

So I think the defendants have made it clear that they're not going to get this Court escape the burden of this litigation.

So the question then is, I believe, would the burden imposed by accepting original jurisdiction, as we urge this Court to do, especially where the Master can be a Federal District Judge, who is thoroughly familiar with the case and who has indicated that but for the legal obstacles which the defendants are raising he would most probably be prepared to go to trial on the equitable claims in December 1972; is that burden really greater than the burden imposed by the persistent threat from the defendants of what can only be characterized as protected and piecemeal litigation?

And beyond the burden that would be imposed on this Court, is the burden which would be imposed on the entire Federal Judicial system, if the defendants succeed in delaying the trial to a point where the possibility of equitable relief through retrofit is no longer a viable one, because of the delays in time and the cars leaving the road at the rate of eight to ten million a year, as it accelerates, as I explained to the Court yesterday. Because at that point, at some point

in the future, money damages would then be the only sensible recourse of these States, and the difficulties and complexities of this case will be very bit as great or perhaps greater than the Multidistrict Panel warned of when it assigned these cases to Judge Real.

Now, the defendants also will be greatly burden by multiple jury trials and diverse appeals, but apparently they are willing to bear this burden in order to avoid paying in this way for their Sherman Act violations.

It is to avoid these burdens on the Court, on the Federal Judiciary, on the 34 States and New York City, and to obtain an early end to the litigation, and to preserve the possibility of retrofit relief at the defendants' expense as a viable remedy for the wrong alleged, that we urge this Court now to accept original jurisdiction of this case, appoint Judge Real as your Master, and let us proceed to trial in December 1972.

That is my argument.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tausend.

Mr. Cutler.

Mr. Cutler.

ORAL ARGUMENT OF LLOYD N. CUTLER, ESQ.,

FOR THE DEFENDANTS

MR. CUTLER: Mr. Chief Justice, and may it please the Court:

The Defendants urge that this case is governed by your decision at the last term in Wyandotte and that in one important sense it is simpler than Wyandotte.

In Wyandotte, you based your decision on two major grounds -- the availability of another impartial and no less appropriate forum even though Ohio had not filed suit in that forum and, as a "cogent reason of practical wisdom" for declining jurisdiction in the light of your other responsibilities, the possibility of imminent legislative and administrative relief for the factually and technically complex environmental problem there involved.

In the present case, the Court need not reason on the basis of the hypothetical availability of other no less appropriate forums or on the mere possibility of legislative and administrative relief. In the present cases, the same Plaintiff states and the Amici states have already filed essentially the same suit against all the Defendants in other more appropriate district court forums where pretrial preparations, as Mr. Tausend just told you are actively proceeding and, moreover, a comprehensive program of

legislative and administrative relief for the even more complex environmental problems here, both at the federal and the state level is already ongoing fact.

I would like to ask the Court, if it would, to look at our Supplemental Memorandum in Opposition which is the cream-colored memorandum filed on December the 23rd, and if you will turn to the opinions of that memorandum, you will see a compilation of all of these pending district court cases which have now been consolidated for pretrial purposes.

Q He says it is a matter of the trial strategy on your side that it is impossible to get these tried together, so it is separate.

MR. CUTLER: I don't think it is correct to say, Mr. Justice Douglas, that it is "impossible." It is our belief, number one, that the question of whether these cases should be transferred to a single district court for trial and then consolidated for trial is a question that can be best evaluated when the pretrial proceedings are further along, the identity of the witnesses and the nature of the issues are better known, the question of whether the cases as they present themselves for the different states are essentially different casesin major aspects such as the quality of the air in a given state, the impact of the defendants' activities on the quality of the air in that state and the relationships that have gone on between the regulatory authorities and the

automobile companies in that state.

Q Are you suggesting that we hold decision on this?

MR. CUTLER: No, sir, I am suggesting that that is an entirely appropriate question for the district court to resolve because of the transfer powers and the consolidation powers when the pretrial proceedings are further along. Moreover, if you would look at the Appendix, sir, you will see that these Plaintiffs, most of them after they filed a single case before you, when the time came as Mr. Tausend mentioned, when they decided to file district court complaints to protect against a fairly remote statute of limitations possibility, they filed those complaints, not in one action, as they had filed before you, which they were perfectly free to do, they filed those complaints -- as you will see on page 42 in Appendix A -- in some 12 different federal districts, 8 of them as widely separate as Hawaii and Maine, as it happens, elected to file a single complaint in the central district of California, but the others -- for reasons best known to themselves -- elected to file in separate districts, thus creating this transfer problem about which the y are now complaining.

In fact, they did this after we, in our initial Memorandum in Opposition to the filing of the complaint here had said that this Court's original jurisdiction is not

necessary. If they want to achieve their purpose of a single trial, all they had to do was get together and file a single complaint of the same type in a single district court which they did not do.

Moreover, even though they failed to do it, the district courts, among them, clearly have the power to transfer these cases under Section 1404 and to consolidate them for trial under Rule 42, should they conclude, despite the arguments we may very well make to the contrary after the conclusion of the pretrial discovery that consolidation and transfer are not in the interests of justice.

Q Mr. Cutler, aren't the differentiating factors which you mentioned in response to Justice Douglas' question primarily ones that would deal with remedy rather than liability?

MR. CUTLER: No, they are not, Mr. Justice Rehnquist, because liability in a Section 16 action and in a Section 4 action -- which the Plaintiffs have also brought in their district courts depend first on the proof of an anti-trust conspiracy, let us say, and, second, of the impact of that conspiracy on the particular Plaintiff.

For example, there is an allegation in these complaints that the Defendant conspired to delay the installation of one particular retrofit device on vehicles in the State of California for one year. We would intend to show not only that

we did not so conspire, but that if we had, that particular act could have had no effect -- certainly no tangible impact -- on the quality of the air or any injury to the State of Hawaii or the State of Maine or any of the other states which are not directly involved in that particular act.

If you will look again at this list of cases, at page 42, many of these cases in the district court, in fact all of those that are brought by states, are -- contained the same allegations that are contained in these cases before you. But in addition to that, they are class actions brought on behalf of all the political units in those states and they are also actions for damages. And we would submit to you that the districts which have those cases before them are far better able to deal with the Plaintiffs' present request made to the district court to drop their damage claim and to deal with the question of how the dropping of those claims is to be resolved among the various members of their classes and how the question of dropping the damage claims in some but not all of the state cases -- because California has declined to drop its damage claim -- and has declined to seek this early equity trial -- how those problems are to be resolved, first to make sure that the dismissal of these class action complaints below is properly approved by the Court and, second, how any jury trial or right to jury trial issue under Beacon Theatres are to be resolved.

Q Those actions you say, Mr. Cutler, are class actions and that they ask for damages as well as for an injunction?

MR. CUTLER: That is correct, Mr. Justice.

Q They are class actions, and are they also Parens Patriae actions?

MR. CUTLER: All of them plead Parens patriae claims including the ones before you.

Q And in our case, today, the Parens patriae claim is not as a class action?

MR. CUTLER: It is not as a class action.

Q It is only for injunction relief?

MR. CUTLER: That is correct. And remember, of course, that you have before you only 18 of the states, whereas the district court has before it some 36 states, one of which at least has said specifically it does not intend to drop its damage claim and does not intend to seek this early equity trial, therefore raising the set of Beacon Theatres problems that only the district court, we believe, can resolve. It has all these cases before it. It has all the classes and it can arrive at the proper resolution of which cases should be tried first.

I want to say in that connection in the light of Mr. Tausend's comments first, that what he quoted from my remarks below before Judge Real dealt essentially with the

question of when transfer and consolidation were ripe issues for consideration and not with the question of -- essentially -- of power in the district courts to accomplish those two things whenever they might be required.

Q Mr. Cutler, what do you view as a Parens patriae? You say that's what this is, in this Court?

MR. CUTLER: I say only, Mr. Justice White, that these Plaintiffs have pleaded their case as Parens patriae claim for the injunctive relief they seek in lower court. Whether the Parens patriae point is significant or not, I have no idea.

Q Well, what is that? The term, "patriae?"

MR. CUTLER: This, I take it, is the issue you have before you in the Hawaii case, but their claim is that on behalf of all the citizens of their state, they are seeking the injunctive relief which they claim to be necessary to improve the quality of the air in their state, for our anti-trust violations.

Q They didn't invent that concept, did they?

MR. CUTIER: No, Mr. Justice Douglas.

Q It is very familiar.

MR. CUTLER: I am not making an issue of the fact that they have included a Parens patriae claim, and I don't know that it is significant to your question of --

Q Well, is there any other claim here?

MR. CUTLER: Well, I believe that they are suing

as state and as Parens patriae. They say they are bringing the action in their capacity as Parens patriae, et cetera, et cetera and as proprietor of state lands, properties and resources.

Q But in any event, you don't challenge their standing or their cause of action? You don't say that they don't plead a cause of action?

MR. CUTLER: No, sir, and in fact, we do not challenge the jurisdiction of district courts in any way. These Defendants are suable in virtually any district. They have not contested the suits pending in any states.

Q And you don't contest our jurisdiction?

MR. CUTLER: Of course we don't contest your jurisdiction, sir.

Not only is the district court a perfectly appropriate forum, an equally appropriate forum for you, but we submit, Your Honors, that the district court is a more appropriate forum, even though I don't think it is necessary for you to reach that level of proof. You have only taken one original antitrust case, so far as I know, and that is Georgia against Pennsylvania, and that case was taken on the express ground, as we understand it, that the district courts -- where, incidentally Georgia had not filed -- none of the district courts, reasoned this court, could have in personam jurisdiction over all of the Defendants and that is why you took this as an

original jurisdiction case, saying, in the Opinion of the Court, "Though in other respects we assume it...." namely district court jurisdiction "....would be wholly appropriate" and here all of the handicaps of this Court as a trier of fact, since you cannot listen to the taping of evidence in the first instance, cited in the defense, in the Georgia case, overridden in Georgia only for a reason that is not present here, would be before you.

This is not, the Plaintiffs appear to believe, a simple per se antitrust case and the Government never contended, when it brought its own suit, that it was a per se case. It is a case that involves a complex history of some 20 years of interaction between governmental authorities and the automotive industry as both of them were gradually coming to realize the significant effects of automotive emissions on the general air quality and the case has a unique quality to it that is going to require extensive briefs because it is the first case -- to our knowledge -- that involves the, what economists call the "principle of externality," namely, the incorporation of a feature in a product such as an automobile which is put there for social or for public purposes and which the individual purchaser of the vehicle does not perceive as having any utility to himself, on his vehicle, and will not pay an additional price for, if you give him a choice.

In fact, in the case of an emission control, apart

from its cost, the purchaser may regard it as a positive detriment because of its adverse effects on fuel economy, on idling, on heating up in traffic and on cold starting and we have filed with the Court, since the relief, of course, that these Plaintiffs insist on as retrofit relief, we filed with you yesterday a recent report submitted to the Air Quality, Air Resources Board of California by its staff on February 16th. It is only 6 pages long and I urge you to look at it because it analyzes all of the available retrofit cases that have been submitted to the State of California which does have a mandatory retrofit law and which will require all of its citizens to retrofit when and as the state triggers the law by certifying a particular device -- something after years of that law being on the books that the state has not yet done.

Plaintiffs have said to you that the problems this Court faces with its difficulties as a trier of facts, could be resolved by appointing Judge Real as your Special Master. But this really would not resolve the problems you face as a trier of fact. Judge Real, sitting as Special Master, would -- could only recommend findings of fact to you on which you would have to make an independant evaluation and he could only recommend to you rulings on issues of law, as Plaintiffs themselves seem to admit.

He could do far less himself and he would involve you much more in interlocutory and other reviews as to what he was

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Going if he sat as your Special Master than if he and other district judges sat as judges. They could dispose of issues as district judges which they could not dispose of as Special Masters. For example, if there were a plea of the statute of limitations answered by a claim of fraudulent concealment or a motion to dismiss at the end of the Plaintiff's case.

Judge Real or another district judge could decide those and the whole case might be over at that point, subject only to appellate review and appellate review which might never reach you and might be resolved in the court of appeals and, despite what Mr. Tausend has said, it is perfectly possible that if these cases are tried in the district courts they will only be resolved in ways that never make it necessary for this Court, at least, to grant certiorari and review any particular aspects of them.

Further, if Judge Real were to function not only as the appointee of the Multi-district Panel in all of these other cases but also as your Special Master he might find a conflict of interests in those two responsibilities. You might say, "Can a Master serve two masters?"

But he is responsible to the Multi-district Panel for the expeditious conduct of the pretrial proceedings in those other cases. Suppose we were to say to him at some point that we felt the California case, which raises both damage issues still as equitable issues, should be tried first

because California was the state with which asked the automobile companies in the first instance to appoint a committee to get to work in this area and most of the interaction between the industry and the government took place initially with the State of California, and if that case were tried first and we were to raise that as the case that should be tried first, the Beacon Theatres problems would be resolved.

How could Judge Real, sitting both as your Special Master in these cases and as the Multi-district Panel judge in the other cases resolve that problem? He would have to take his orders from you, which might be to proceed with this case, which might be essentially incompatible with his other duties.

Furthermore, you had an experience with a Special Master in the only original antitrust case you ever took. Georgia, you will recall, came to you itself for urgent, equitable relief. That's all you took. And you appointed a highly competent Master. Georgia thought probably also it had a simple document case, one that it put into the Master in one day, yet it took this very capable Master, Mr. Lloyd Garrison, four years to hear, first, the Defendant's proof of a lack of conspiracy and the essential reasonableness of what they had done and to prepare these reports, and the report itself was some 700-odd pages long. There were more than 15 volumes of testimony and a dozen volumes of exhibits which you would have had to review. You were fortunately spared that -- which might

13 have taken another year -- because Georgia itself voluntarily dropped its case as mooted by suspending ICC procedures.

So we would say to you, Your Honors, that the district courts, left to themselves, we believe -- and with whatever appropriate appellate review first through the courts of appeal, on which you have always relied in the past in antitrust cases and which you have been very unhappy to see eliminated from the review of direct appeals by defendants in government antitrust cases -- you could rely on them to see that the proceedings were going forward expeditiously.

Judge Real, I can assure you, sitting as a Multidistrict Panel judge, is applying the lash very vigorously to all of us and the Defendants in this case, far from doing what Mr. Tausend has said, have been taking the initiative below in pretrial discovery. We filed our firstwave discovery request, something like a month before they were required to be filed. The Plaintiffs have not yet filed theirs.

We initiated the taking of depositions of some of our older witnesses and we have said to Judge Real --who, incidentally has not yet approved the December trial date and has not yet adopted on any permanent basis the Plaintiff's program but wants to see the reaction of these classes and municipalities first -- we have said to him that we are prepared to go forward and to accept any target date for the completion of pretrial and to go forward as rapidly as any case involving

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20 years of history in this rather abstruse technology in these relationships with various government agencies would permit.

Q Mr. Cutler, you say that some of these cases in the district courts are essentially different from each other?

MR. CUTLER: Some of the state cases, we would submit, Mr. Justice White, are sufficiently different from one another so that it might not be expeditious to put them all together in one, big, single, consolidated trial.

Q Well, if there was a Special Master appointed and if we took jurisdiction and appointed a Special Master and he faced these same states, would you suggest that he may have to try different states separately?

MR. CUTLER: Yes, Mr. Justice White, we would, should you take original jurisdiction and depending on whether the pretrial discovery proof worked out as we believe it would and the sharpening of the issues worked out as we believe it would.

Q My understanding of the federal -- new federal law is that the federal standards would apply only to cars manufactured after a certain date. And the Petitioner here is talking about cars presently on the road. Is that right?

MR. CUTLER: That is part of the relief he is asking, Mr. Justice White, but it is the only part on which he is concentrating and urging you to take original jurisdiction of the case.

Q All right, now, my question is this: As a

matter of federal law, that phase of the problem is left to the states to work out as they might choose, is it not?

MR. CUTLER: That is correct, sir.

Q So you could have 50 different standards?

MR. CUTLER: For retrofit.

Q Beg pardon?

MR. CUTLER: For retrofit, as you would say --

Q Yes.

MR. CUTLER: -- for what kind of device would be put on a car already in use of a licensed driver.

Q One thing in California, another in Idaho, another in Washington. Is that true?

MR. CUTLER: That is correct.

Q So we are not dealing with an overall federal rule. The only federal rule is a federal rule that leaves it to the states.

MR. CUTLER: That is correct, Mr. Justice Douglas. And this was an advertent thing. The Senate and the House when they passed the Clean Air Amendment of 1970 considered imposing a mandatory retrofit requirement and concluded that a retrofit program was not manageable at federal level -- this is on pages 25 to 32 of that same Memorandum -- and should be left to the regions, the Air Quality Regions and the states which means initially the states.

Q Well, Mr. Cutler, let's assume we took

jurisdiction and a Special Master proceeded. I take it that in a suit like this the federal law governs. Is that your submission?

MR. CUTLER: In a suit like this as to determining the existence of an antitrust violation and the remedy, federal law would govern.

Q And are you suggesting that the action of Congress would suggest to the Special Master and to this Court that although the federal law would govern the remedy, that we would borrow state law or state standards. Is that what you are suggesting?

MR. CUTLER: Well, actually what would happen, Mr. Justice White, is that, as the Plaintiff has conceded below, is that a remedy from this Court would be worthless without the enactment of a statute in each state requiring every car owner to install a retrofit device, whether it was paid for by him or furnished at the cost of $1 billion by us and to maintain that device thereafter.

Now, the interesting thing is that all of these states --

Q Yes, but I am asking you, let's assume that the question was what kind of a -- let's assume that it was found that there was an antitrust violation, under the federal standards --

MR. CUTLER: Yes.

Q Now, on the remedy, what kind of a retrofit device would --

MR. CUTLER: All you would --

Q -- would be ordered to be installed, say, in California as compared to Illinois?

MR. CUTLER: I don't think you have any power, under Section 16, to order this sort of a remedy, a retrofit remedy, today. All you could do, I believe, would be to order the installation of such a device as the state, by legislation or regulation, might or might not require.

Q Because the state has some leeway, under the federal act?

MR. CUTLER: Not only does it have leeway, the states disagree very widely, despite what they say here, about whether there should be retrofit.

The states, as I started to say a moment ago, six, have filed their so-called "implementation plans" with the Environmental Protection Agency as to what they intend to do on air quality.

Q If we --

MR. CUTLER: We filed those with you yesterday. Not a single state, Mr. Justice Douglas, of these 34 Plaintiffs and amici have said it intends to adopt a retrofit program. Several of them have said that retrofit is unnecessary or impracticable or would have minimal effect, these very states that are before

you today -- and we filed this paper with you yesterday analysing those public filings have all said that they do not intend to seek a retrofit program.

The only one that has said the contrary is California and California is not seeking an original remedy from you or an early equitable trial. It intends to proceed with the claim for damages.

Q Well, if we took the case and we had hearings and entered a decree, that would not in any way touch the Environmental Protection Agency, would it?

MR. CUTLER: It would not -- it might, Mr. Justice Douglas in that --

Q In what way?

MR. CUTLER: In this way, that the federal government (sic) decided that the thing is a federal government of which, in a sense, you are a part, should concentrate on was emissions from new cars and that the manufacturers faced very substantial problems in working out the technology and incurring the costs necessary to meet those standards. It is still a very near thing whether we are going to meet these new standards or not, but if, on top of our obligations to meet standards on new cars, which none of us have yet figured out how to do, this Court, or any other court, would impose on us a substantial retrofit obligation, amounting to some billions of dollars on the production of 50 million units for that purpose, it might have

a very substantial effect on the EPA program.

Q Well, Mr. Cutler, I thought in part, your argument was that Congress has said in a situation like this that state law is to be the governing standard?

MR. CUTLER: Congress has said that the question of whether a car should or should not be retrofitted -- the car is already on the road -- cannot be managed at the federal level.

Q Well, then, if we were --

MR. CUTLER: It is left to the states.

Q If we were saying federal law governs this suit but we must look to state law to see what the federal standard should be, and a state has said there is no retrofit law in our state, in fact, there would be no remedy if you --

Q Well, I don't even have dirty air once -- under the federal act.

MR. CUTLER: I'm not sure I understand that. Are you speaking with respect to old cars?

Q This is going to reflect on old cars.

MR. CUTLER: Well, a state could decide --

Q This is no reflection on Idaho, but Idaho could --

MR. CUTLER: But Idaho could also decide that it doesn't want dirty air, but that emissions from old cars in Idaho are not a problem, that carbon monoxide in Idaho is not a problem, that hydrocarbons in Idaho are not a problem, and

that oxides of nitrogen are not a problem and that that is not a useful expenditure of resources to cure air pollution.

Q And then Idaho would not be one of these complaining parties in this Court.

MR. CUTLER: And yet the very states, as I said, that are here before you and in the district court demanding this retrofit at Defendant's expense have just filed plans with EPA saying -- none of them saying -- that they intend to propose a mandatory retrofit program and yet these Plaintiffs have conceded below that no remedy any court could grant would work unless the states had such laws.

Q Well, Mr. Cutler, might it not be reasonable on the part of the states that we will not impose a retrofit program at the individual car owner, but if the automobile companies can be made to pay for it, we would be perfectly willing to support it in that and.

MR. CUTLER: Perhaps so, Mr. Justice Rehnquist, but I think that very question, that posture, would bear on the alleged urgency of this remedy and the fact that the remedy may be disappearing unless the states do something about it.

California, which has the most urgent problem, has decided to go ahead and rely on its claim for damages. If the relief were really that urgent, other states would do the same and, certainly, these Defendants should not be deprived of the fullest opportunity to prove, (a), that there was no antitrust

violation, (b) that if there was one, it had no impact on that particular state and (c) even if it did have an impact, the air quality requirements in that state are not such as to justify thisdrastic remedy which goes far beyond anything that has ever been called for under Section 16.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cutler.

Mr. Tausend, do you have something further?

REBUTTAL ARGUMENT OF FREDRIC C. TAUSEND, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TAUSEND: Yes, I do, Your Honor.

Your Honors, this is not an air pollution case. This is not a retrofit case. This is not a nuisance case. It is an antitrust case for equitable relief only and it is true that we have emphasized, in urging you to accept original jurisdiction, the likely possibility of seeking -- as we do now and seeking at the end of the trial -- retrofit relief for pre-1968 cars as the most adequate remedy if we prove the antitrust wrong.

Q Well, isn't that the only remedy you are seeking that is in addition to what the government already has?

MR. TAUSEND: Well --

Q Aren't these defendants already under an injunction?

MR. TAUSEND: Yes. We are not seeking preventative relief, Mr. Justice White. We are not trying to collaterally--

Q Well, then, what do you want -- in addition to what the Government already has?

MR. TAUSEND: The other possibilities we hold out are a possibility of additional devices or new cars if the technology is speeded or an accelerated research program is. We are not particularly emphasizing at these times and might raise additional problems. But we do want to keep the equitable relief flexible, although we think, and we are pretty sure that the -- partly because of what the Defendants have said and what the technology seems to be producing -- that the retrofit device, making these cars manufactured during the period of the conspiracy clean cars which they would have been but for the antitrust conspiracy is the most fittive device.

But I want to make clear that we are not asking this Court today to decide that issue. We are asking this Court -- because we think it would be premature. It came before Judge Real and he said it is premature and we quoted in our reply brief that Judge Real said,"At the end of the trial, when the evidence is in, it is possible that Plaintiffs, these states, will be able to show facts to this Court sitting in equity that will justify the kind of relief --"

Q Do you agree that Congress has left the retrofit matter to the states?

MR. TAUSEND: Well -- in legislating, Your Honor, yes, I do. Congress has said that in respect to the pre-1968

cars, the standards of emissions are up to the states, but I don't think that that says anything about what would happen if an antitrust violation was --

Q All right, let's say that we took jurisdiction and found an antitrust violation and then would we be free in the face of what Congress has said, to fashion here our own standards with respect to the used car -- the cars on the road?

MR. TAUSEND: I certainly think so, Your Honor. Congress certainly has not given any indications to abandon the field in any way.

Q Well, I thought it said that as far as the past is concerned that the federal law should at the very least look to the states.

MR. TAUSEND: Well, Congress --

Q For standards.

MR. TAUSEND: I think this, Mr. Justice White, Congress made a political compromise. They passed a law and they said, we're -- on the facts that we have before us -- we're going to set emissions standards based on things done to new cars.

Q Did you address yourself to this matter in your brief?

MR. TAUSEND: Well, we addressed ourselves, yes, in our reply brief and particularly in our --

Q Well, we asked you about what would the

24 governing law be in this case?

MR. TAUSEND: Well, on that point we --

Q You say it is federal law but in the process of fashioning federal law, do we have to look to the state law, borrow state law in light of what Congress has said?

MR. TAUSEND: No, because I think very different considerations are involved except, possibly, for this. I think what -- you not only have federal versus state law here, Mr. Justice White, but I think you also have something that isn't really a preemption argument at all, which is the role of a legislative body in regulating the air and the role of a court of equity in remedying an antitrust violation.

Now, it just so happens that the antitrust conspirators, the antitrust defendants, effectuated their conspiracy in an area which affected the air, and so I don't think it is a choice of more question in that case at all.

I think when the equity court comes to render the decree, it is going to have to consider the state of the art, it is going to have to consider -- by that time, Mr. Justice White, it is entirely possible that federal law will govern used cars because Congress has not necessarily indicated an intention to stand still on this and the EPA, the federal agency, has a real role in directing the states and stimulating the states in respect to the retrofit and inspection program. It is my guess that they may --

Q All right. Is Congress free to specify the standard applicable in original actions?

MR. TAUSEND: I don't belive so. I believe that the standard applicable in original actions is set in Article III of the Constitution and derives from the powers of this Court and the only thing there is that because this Court, in original actions such as this one, not state against state, sir, but state against citizens of another state, is concurrent -

Q Well, you are relying on his Congressionally-set standard in bringing this action, namely the Sherman Act?

MR. TAUSEND: Yes.

Q I suppose Congress is free to provide the law that would govern original actions in this Court.

MR. TAUSEND: You mean, to take away jurisdiction from this Court?

Q I didn't say "jurisdiction." I said the law, specify the law.

MR. TAUSEND: I see. I see, not the exercise of discretion but the law applicable. They have specified the law applicable in specifying the Sherman Act.

Q All right, and they could control the remedy?

MR. TAUSEND: I would have very serious question with a Congressional imposition on the powers of a court of equity to grant equitable relief and if I may refer to Guaranty Trust versus York, which is not in our brief. It is 326 U. S. 99.

Mr. Justice Frankfurter in that Opinion wrote a rather extended dissertation on the powers of equity and where equity powers in the federal court came from.

Q How about the Norris-LaGuardia Act, Mr. Tausend, would that apply?

MR. TAUSEND: Yes, I think there are instances where the Court's hands could be stayed in something like that, but that hasn't happened here, Mr. Justice Rehnquist. In fact, to the contrary, all that I see that has happened is that Congress isn't ready yet, and hasn't been ready yet, to apply emissions standards to used cars. That is really all that has happened.

It might be, by the time this Court was ready to decide this case. But I think that a lot of the reason why Congress hasn't been ready yet to do that is who pays for it?

Now, Mr. Cutler mentioned the cost.

Q Well, could we make the car owner do it?

MR. TAUSEND: Could this Court make the car owner do it?

Q Make him accept it.

MR. TAUSEND: Well, I think this, and --

Q The answer is no.

MR. TAUSEND: You could -- you couldn't --

Q Right?

MR. TAUSEND: You couldn't --

Q Right?

27 MR. TAUSEND: -- make him accept the retrofit?

Q Yes.

MR. TAUSEND: Yes, I think that's right, Mr. Justice Marshall, except for this: I think that the relief, the equitable relief could be conditioned on a state enactment of retrofit law or some other retrofit administrative requirement.

Q We could make the state pass a statute?

MR. TAUSEND: I think --

Q Huh? Could we?

MR. TAUSEND: I think --

Q Could we make the state pass a statute?

MR. TAUSEND: I think you could get conditioned relief on it but I don't think you could direct the state to pass a statute. But I think that a court of equity could -- and frequently does condition relief --

Q Well, could we here and now order or require one of these states that is not involved to do so? Obviously not.

MR. TAUSEND: Not one that is not involved.

Now, there are -- I would like to talk about two things, because I think you could -- you couldn't get the states that are not involved, because they wouldn't be in the antitrust case and they wouldn't be involved in the anti-trust decree, but I think you could condition, or a court of equity could condition the granting of the equitable relief

on meeting certain standards, and one of the standards would be that the retrofit be put on the cars so that the cars could be made clean.

Now, I would like to mention two things in that context. One is that Mr. Cutler referred to the cost of equitable relief and how this cost would somehow interfere with the efforts of the automobile companies to go ahead and meet the '75 standards. I think their argument simply has no place here at all and I would like to put it in perspective.

The cost of these devices, according to these Defendants is approximately $20 a device. We are talking now, today, of about 50 million used cars. Each year at least 8 million go off the road, so we are talking, at most, about le s than $1 billion. In the light of an antitrust conspiracy that lasted 15 years, and in the light of net after tax revenues of General Motors alone, in 1971 of over $2 billion. So I am not saying it is a little amount of money that is involved, but it is not the kind of gigantic staggering cost that Mr. Cutler has indicated to the Court would be involved.

And secondly, it should be pointed out -- which is exactly what the Defendants want to accomplish -- that as we go on, each year 8 million leave, $116 million is depleted from the obligation that these Defendants could meet if retrofit is the correct and adequate remedy.

And I would like to say that Mr. Cutler did say that,

29 when I quoted him, he was talking in 1404 about a "premature argument," that it would be "premature to transfer at this time." But he went further with that on page 53 of the transcript and said -- and I assume he still believes it -- "There is a major substantive issue as to whether Section 1404 meant that a transferee judge could, in effect, transfer cases to himself for trial."

I would like to say who is in this case. Mr. Cutler said there are 18 states and California isn't in. Well, California did sign the Amicus brief in which it said, "If the Court agrees to entertain this complaint, Amici will seek leave to join as plaintiffs here."

Now, they haven't changed that position. California is under just a little bit tighter gun than some of the rest of us and it is because their state is getting very close to ready. They passed a statute in November, 1971 requiring retrofit when devices are certified and made mandatory by the Air Resources Board.

In the February, 1972 report which Mr. Cutler submitted late yesterday to this Court there is an indication of how that is proceeding. Devices are just about ready for certification and as we are worried about a trial being postponed long enough so that the equitable relief is no longer viable, as cars go off the road, so California is concerned that when their retrofit law goes into effect and when cars

start being retrofitted at the expense of California, the equitable remedy may not be adequate. Now, as we have pointed out --

Q What do you mean? Under that law, does the state pay the cost?

MR. TAUSEND: No, under that law the individual citizen of California pays the cost, and that is why they are concerned that they would need an even quicker resolution of this, but it would be some time in '72 before their equitable relief becomes a less viable remedy to them.

Unless this Court, as we indicate in our brief, can, under Vain versus Barnard ? and related cases, direct that the wrong be repaired at the expense of the Defendant and make restitution

MR. CHIEF JUSTICE BURGER: Thank you Mr. Tausend.

Thank you, Mr. Cutler.

The case is submitted.

(Whereupon, at 10:57 o'clock a.m., the case was submitted.)